A

Tan Yoke Mee & Anor v Tajudin bin Ibrahim & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-(NCVC)(W)-462–07 OF 2018
MARY LIM, HAS ZANAH AND VAZEER ALAM JJCA
23 OCTOBER 2019

C *Land Law — Ownership — Dispute — Plaintiffs claimed legal and beneficial ownership rights over property — Whether sale and purchase agreement conditional agreement — Whether there was uncertainty in subject matter — Whether property only held in trust — Whether there was negligence by solicitors*

D

This suit by the appellants ('the plaintiffs') against the respondents ('the defendants') was primarily to assert legal and beneficial ownership rights over a shop lot ('the property'). The first defendant counterclaimed for the same purpose while the sixth defendant counterclaimed for damages for defamation. By a sale and purchase agreement ('the SPA'), the plaintiffs purchased from the fifth defendant the property for the sum of RM800,000. The plaintiffs paid the purchase price in full and was given vacant possession of the property from around August 2008. In December 2015, the plaintiffs discovered that strata title for the property had been issued to the first defendant who proceeded to assert possessory rights over the property. The plaintiffs commenced action seeking, inter alia, a declaration at the High Court that: (a) the plaintiffs were the legal and/or beneficial owners of the property; and/or in the alternative; (b) the first defendant was the trustee for the plaintiffs of the property. Relying on the terms and conditions of the SPA, the plaintiffs alleged that the SPA stated: (i) by a SPA ('the principal agreement'), the second defendant, with the third defendant's consent, agreed to sell and the first defendant agreed to purchase the property with vacant possession; (ii) by a second SPA ('the second agreement'), the first defendant sold and the fourth defendant purchased and accepted the assignment of the property together with all the rights, title and interest of the first defendant under the principal agreement; (iii) by a third SPA ('the third agreement') and a corresponding deed of assignment, the fourth defendant sold and assigned and the fifth defendant purchased and accepted an assignment of the property together with all the rights and interests of the fourth defendant under the principal agreement; (iv) the fifth defendant had settled the purchase price in full to the second defendant under the principal agreement; and (v) by the SPA, the plaintiffs purchased the property from the fifth defendant and paid the purchase price in full. The plaintiffs also claimed against the sixth defendant ie the solicitors acting for them in respect of the SPA, for negligence. The second defendant alleged that master title

E F G H I

number of the plaintiffs' unit as mentioned in the SPA differed from that appearing in the principal agreement and that there was a difference in the measurement of the unit concerned. The learned judge dismissed the plaintiffs' claim and the counterclaim and hence this appeal.

Held, allowing the appeal:

(1) The SPA was not a conditional agreement and it was not void for uncertainty. The existence and authenticity of the three agreements relied on by the appellants were not in issue. The actions taken by the various parties thus far in any case, affirmed the existence of these agreements; especially the action taken by the fifth defendant in suing the fourth defendant to assert his rights under the third agreement. Further, the arguments raised in relation to the assignment or lack of such assignment were also irrelevant since the title to the property had already been issued (see para 16).

(2) The matter of certainty of subject matter, whether the property which formed the subject matter of the SPA was the same subject property under the principal agreement and the second and third agreements but more importantly, whether it was the same property to which strata title had been issued to the first defendant. The answer was clearly in the affirmative. The property under the SPA was readily traced to and through the several agreements starting with the principal agreement made between the first defendant and the second defendant. The subject property of that principal agreement was clearly acknowledged in the SPA. Save for the differences in the size of the property in question and the details of the title in the master title, the other details identifying the subject matter or property in question were clear and the parties were not confused to the point where there was no consensus ad idem such as to invalidate the SPA. The differences were minor and could be and were easily explained away by the appellants and the witnesses called. The property was always otherwise described and recognised as a 'shop lot', be it under the principal agreement or the SPA; or even the second and third agreements. The plaintiffs had adduced more than sufficient evidence on the positive identification of the property. The discrepancies and mistakes as mis-descriptions which did not vitiate the SPA (see paras 17–18, 23–24 & 26).

(3) The third defendant was not entitled to transfer the registration of the strata title in favour of the first defendant as the first defendant had already divested his interest in the property by virtue of the second agreement, the existence and validity of which could not be disputed. The third defendant held the property in trust for the plaintiffs as bare trustee as the plaintiffs had fully paid up the purchase price. Since the first defendant had already sold his interest to the fourth defendant under the

second agreement, the first defendant held the property registered in his name as bare trustee for the plaintiffs (see paras 28–29).

(4) The sixth defendant owed a duty of care towards the plaintiffs in respect of the matters complained of. However, whether such obligations in the respects existed in law and fact was entirely a different consideration. In this regard, there was no case established against the sixth defendant and the claim was correctly dismissed and the appeal was therefore dismissed. This alternative cause of action and remedy did not arise (see paras 30 & 32).

[Bahasa Malaysia summary

Saman ini oleh perayu ('plaintif') terhadap responden ('defendan') bertujuan untuk menegaskan hak pemilikan yang sah dan berkepentingan ke atas lot kedai ('hartanah'). Defendan pertama menuntut untuk tujuan yang sama sementara defendan keenam menuntut tuntutan ganti rugi kerana fitnah. Melalui perjanjian jual beli ('SPA'), plaintif membeli dari defendan kelima hartanah tersebut dengan jumlah RM800,000. Plaintif membayar harga pembelian sepenuhnya dan diberi hak milikan kosong dari sekitar Ogos 2008. Pada bulan Disember 2015, plaintif mendapati bahawa hakmilik strata untuk hartanah itu telah dikeluarkan kepada defendan pertama yang kemudian menuntut hak milik atas hartanah tersebut. Plaintif memulakan tindakan memohon, antara lain, pengisytiharan di Mahkamah Tinggi bahawa: (a) plaintif adalah pemilik sah dan/atau berkepentingan hartanah; dan/atau sebagai alternatif; (b) defendan pertama adalah pemegang amanah bagi plaintif atas hartanah. Dengan bergantung pada terma dan syarat SPA, plaintif mendakwa bahawa SPA menyatakan: (i) melalui satu SPA ('perjanjian utama'), defendan kedua, dengan persetujuan defendan ketiga, bersetuju untuk menjual dan defendan pertama setuju untuk membeli hartanah dengan milikan kosong; (ii) melalui satu SPA kedua ('perjanjian kedua'), defendan pertama menjual dan defendan keempat membeli dan menerima penyerahan hartanah itu bersama dengan semua hak, hakmilik dan kepentingan defendan pertama di bawah perjanjian utama; (iii) oleh SPA ketiga ('perjanjian ketiga') dan akta penyerahan hak yang sesuai, defendan keempat menjual dan ditugaskan dan defendan kelima membeli dan menerima penyerahan harta bersama dengan semua hak dan kepentingan defendan keempat di bawah perjanjian utama; (iv) defendan kelima telah menyelesaikan harga pembelian sepenuhnya kepada defendan kedua berdasarkan perjanjian utama; dan (v) melalui SPA, plaintif membeli harta itu dari defendan kelima dan membayar harga pembelian sepenuhnya. Plaintif juga menuntut terhadap defendan keenam iaitu peguam yang bertindak terhadap mereka berkenaan SPA, kerana kecuaian. Defendan kedua mendakwa bahawa nombor hakmilik utama unit plaintif seperti yang disebutkan dalam SPA berbeza dengan yang terdapat dalam perjanjian utama dan terdapat perbezaan dalam pengukuran

unit yang berkaitan. Hakim yang bijaksana menolak tuntutan plaintif dan tuntutan balas dan oleh itu rayuan ini. A

Diputuskan, membenarkan rayuan:

(1) SPA bukanlah perjanjian bersyarat dan tidak terbatal kerana ketidakpastian. Kewujudan dan kesahihan tiga perjanjian yang diandalkan oleh perayu tidak menjadi isu. Tindakan yang dilakukan oleh pelbagai pihak setakat ini membuktikan kewujudan perjanjian ini; terutama tindakan yang diambil oleh defendan kelima dalam menuntut defendan keempat untuk menegaskan haknya berdasarkan perjanjian ketiga. Selanjutnya, hujahan yang dikemukakan berkaitan dengan penyerahan atau ketiadaan penyerahan juga tidak relevan kerana hakmilik kepada hartanah telah dikeluarkan (lihat perenggan 16). B C

(2) Persoalan kepastian perkara subjek, sama ada hartanah yang menjadi perkara subjek SPA adalah hartanah yang sama di bawah perjanjian utama dan perjanjian kedua dan ketiga tetapi yang lebih penting, sama ada harta itu sama dengan hakmilik strata dikeluarkan kepada defendan pertama. Jawapannya adalah jelas afirmatif. Hartanah di bawah SPA mudah dikesan kepada dan melalui beberapa perjanjian bermula dengan perjanjian utama yang dibuat antara defendan pertama dan defendan kedua. Perkara subjek perjanjian utama itu diakui dengan jelas dalam SPA. Kecuali untuk perbezaan ukuran hartanah dan perincian hakmilik dalam hakmilik utama, perincian lain yang mengenal pasti perkara subjek atau hartanah tersebut adalah jelas dan pihak-pihak tidak keliru sehingga tidak ada consensus ad idem sehingga membatalkan SPA. Perbezaannya kecil dan boleh dan mudah dijelaskan oleh perayu dan saksi yang dipanggil. Hartanah selalu dinyatakan dan diakui sebagai 'lot kedai', sama ada di bawah perjanjian utama atau SPA; atau bahkan perjanjian kedua dan ketiga. Plaintif telah memberikan bukti yang lebih dari cukup mengenai pengenalan positif hartanah tersebut. Perbezaan dan kesilapan sebagai gambaran salah yang tidak merosakkan SPA (lihat perenggan 17–18, 23–24 & 26). D E F G

(3) Defendan ketiga tidak berhak untuk memindahkan pendaftaran hakmilik strata berpihak kepada defendan pertama kerana defendan pertama telah melepaskan kepentingannya terhadap harta tersebut berdasarkan perjanjian kedua, yang mana kewujudan dan kesahihannya tidak dapat dipertikaikan. Defendan ketiga memegang hartanah itu sebagai amanah bagi plaintif sebagai pemegang amanah kerana plaintif telah membayar harga belian sepenuhnya. Oleh kerana defendan pertama telah menjual kepentingannya kepada defendan keempat berdasarkan perjanjian kedua, defendan pertama memegang harta yang didaftarkan atas namanya sebagai pemegang amanah untuk plaintif (lihat perenggan 28–29). H I

(4) Defendan keenam mempunyai kewajipan berjaga-jaga terhadap plaintif berkenaan dengan perkara-perkara yang diadukan. Namun, sama ada kewajipan tersebut berkenaan undang-undang dan fakta adalah pertimbangan yang berbeza. Dalam hal ini, tidak ada kes yang dibentuk terhadap defendan keenam dan tuntutan itu ditolak dengan tepat dan oleh itu rayuan ditolak. Kuasa tindakan dan remedi alternatif ini tidak timbul (lihat perenggan 30 & 32).]

Cases referred to

Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd [2017] MLJU 1107; [2017] 8 CLJ 392, FC (refd)

Legislation referred to

Rules of Court 2012 O 80

Appeal from: Suit No WA-22NCVC-341–06 of 2016 (High Court, Kuala Lumpur)

Micheal Chow (Wong Zhi Khung with him) (Micheal Chow) for the appellants.
SS Gabriel (N Saraswathy Devi) for the first respondent.
G Gunaseelan (M Ramachandran with him) (Rama Samuel & Assoc) for the second respondent.
Ashmadi Othman (Zulpadli & Edham) for the third respondent.
Mohd Zulkhairi bin Kamaruzaman (Nurul Nabila bt Azmi with him) (Companies Commission of Malaysia) for the fourth respondent.
Lee Chee Teong representing himself.
JJ Naidu (JJ Naidu dan Rakan-Rakan) for the sixth respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The appellants before us were the plaintiffs at the High Court. Their suit was primarily to assert legal and beneficial ownership rights over a shop lot. The first respondent counterclaimed for the same purpose while the sixth respondent counterclaimed for damages for defamation.

[2] After a full trial, their claims and the counterclaims were dismissed by the learned judge. Only the plaintiffs appealed. At the commencement of hearing of this appeal, the appellants withdrew their appeal against the third and fourth respondents, and the appeal was accordingly struck out against them with costs.

[3] In this appeal, the parties will be referred to as they were at the High Court.

BACKGROUND FACTS

[4] By a sale and purchase agreement dated 5 August 2008, the plaintiffs purchased from the fifth defendant, an individual, 'the parcel of shop lot known as Parcel D-G-4 measuring an area approximately 840 sqft within Storey No 4 of Building No Block D in a project known as Taman Fadason forming part of the land held under Master Title No HS(D) 99535, PT No 16914 (formerly part of Lot 9016 and 9017) in the Mukim of Batu, District of Kuala Lumpur and State of Wilayah Persekutuan' ('the property') for the sum of RM800,000 ('the SPA'). The plaintiffs paid the purchase price in full and was given vacant possession of the property from around August 2008. The plaintiffs have since then been renting out the property to various tenants without interruption. The plaintiffs have also been paying the quit rent, assessment charges, water, insurance and service charges for the property.

[5] In December 2015, the plaintiffs discovered that strata title for the property had been issued to the first defendant who proceeded to assert possessory rights over the property. The plaintiffs commenced action seeking the following main reliefs:

(a) a declaration that the plaintiffs are the true legal and/or beneficial owners of the property currently held under title PN(WP) 32992/M1/1/5, Lot No 57297, Mukim Batu, Negeri Wilayah Persekutuan, Kuala Lumpur;

(b) further and/or in the alternative, a declaration that the first defendant is trustee for the plaintiffs of the property and is bound to account to the plaintiffs any legal estate or interest therein outstanding in relation to the property;

(c) further and/or in the alternative, an order for rectification of the pleaded agreements, as the case may be;

(d) an order directing the defendants to within seven days from the service of the order made herein take all steps to vest the property in the name of the plaintiffs as legal proprietor and beneficial owners thereof;

(e) an injunction restraining the defendants from interfering with the plaintiffs' rights and possession over the property; and

(f) damages to be assessed against the defendants or such of the defendants as the court shall find liable to the plaintiffs.

[6] Relying on the terms and conditions of the SPA, the plaintiffs alleged that the SPA states the following:

(a) by SPA dated 30 November 2002 ('principal agreement') made between the second defendant of the first part, the third defendant of the second

part and the first defendant as 'first purchaser', the second defendant with the third defendant's consent agreed to sell and the first defendant agreed to purchase the property with vacant possession;

(b) the first defendant had fully paid the purchase price to the second defendant;

(c) by SPA dated 13 June 2005 ('second agreement') made between first defendant and the fourth defendant ('second purchaser), the first defendant sold and the fourth defendant purchased and accepted the assignment of the property together with all the rights title and interest of the first defendant under the principal agreement and upon the terms and conditions stated therein;

(d) by SPA dated 4 July 2006 ('third agreement) and a corresponding deed of assignment dated 4 July 2006 made between the fourth defendant of the first part, and the fifth defendant of the other part, the fourth defendant sold and assigned and the fifth defendant purchased and accepted an assignment of the property together with all the rights title and interest of the fourth defendant under the principal agreement and upon the terms and conditions stated therein;

(e) the sale to the fifth defendant is subject to the fifth defendant obtaining confirmation from the second defendant and/or relevant authorities as provided under cl 2.1;

(f) the fifth defendant has settled the purchase price in full to the second defendant under the principal agreement;

(g) by SPA dated 5 August 2008 ('SPA') made between the fifth defendant as vendor and the plaintiffs as purchasers, the fifth defendant agreed to sell and the plaintiffs agreed to purchase the property;

(h) the plaintiffs have fully settled the purchase price under the SPA;

(i) strata title to the property had not been issued by the relevant authority; and

(j) the plaintiffs were represented by the sixth defendant while the fifth defendant elected not to appoint any solicitors to act on his behalf.

[7] Save for the fifth defendant who did not enter any appearance, the remaining defendants filed their respective defences with the first defendant asserting title and interest by way of a counterclaim and seeking vacant possession. The first and second defendants were initially represented by the same set of solicitors but by the time of appeal, were represented by different solicitors. Due to the peculiarities of the claim, the fourth defendant was represented by the Registrar of Companies; the details of which are no longer relevant with the withdrawal of the appeal against this party.

[8] In substance, the first defendant denied the plaintiffs' claims. In particular, the first defendant:

(a) denied knowledge of the various agreements and the SPA;

(b) claimed that he was not privy to any of the agreements;

(c) claimed that he did not give vacant possession to anyone;

(d) alleged that the plaintiffs' claim for vacant possession was wrong and that the plaintiffs had committed trespass;

(e) claimed that all payments for quit rent and assessments were made by him and that the receipts for such payments were issued in his name; and

(f) claimed that the strata title has been issued to him as the registered and legal owner of the property.

[9] The first defendant counterclaimed that he be declared the registered owner of the property; that the plaintiffs had been wrongfully and illegally occupying the property and had been renting out the property to third parties. The first defendant further claimed for vacant possession and general damages to be assessed by the court.

[10] As for the second defendant, the developer of Taman Fadason, aside from alleging that Master Title number of the plaintiffs' unit as mentioned in the SPA differed from that appearing in the principal agreement and that there was a difference in the measurement of the unit concerned, the second defendant denied owing any contractual obligation or duty to the plaintiffs; especially since it was not a party to the SPA. Instead, its obligations were owed to the first defendant as set out under the principal agreement. Those obligations were met when it assisted in the application of the third defendant's consent to transfer so that title could be registered in the first defendant's favour. It had further not endorsed or confirmed the sale and purchase of the unit by the plaintiffs.

[11] The sixth defendant were the solicitors acting for the plaintiffs in respect of the SPA. The allegations against them is grounded in negligence, that the sixth defendant was in breach of its duty of care owed to the plaintiffs in the following respects:

(a) failing to steps to perfect the plaintiffs' rights over the property;

(b) failing to keep the plaintiffs duly informed of all rights pertaining to the property and/or in relation to the SPA;

(c) failing to ensure that all steps have been taken to ensure that upon issuance, the relevant strata title would be registered or be registrable in the names of the plaintiffs;

(d) failing to advise the plaintiffs of their rights in relation to the property and/or how such rights may be protected;

(e) failing to notice the blatant discrepancies arising from the third agreement and the assignment and novation agreement as to whether the purchase price had been paid to the second defendant and the identity of the person concerned;

(f) failing to conduct a land search for the Master Title which would have yielded up the misdescriptions earlier mentioned; and

(g) without the knowledge or consent of the plaintiffs, commenced civil action against the second and third defendants seeking to compel them to consent to the sale of the property from the fifth defendant to the plaintiffs; and when the action was dismissed, for failing to advise the plaintiffs of the action and of their withdrawal of the related appeal.

DECISION OF THE HIGH COURT

[12] The learned judge dismissed the plaintiffs' claim and the counterclaim. In relation to the plaintiffs' claim that they be declared beneficial and/or legal owners of the property, this was refused on two grounds. First, because the SPA was a conditional agreement and there was no evidence that the conditions precedent had been fulfilled or waived. Second, because of uncertainty in the subject matter — that there was no compelling evidence before the court that the property described in the SPA was the same property referred to as 'D-G-5' and/or 'D-O-5'.

[13] As for the counterclaim, it is readily discerned that it was dismissed because the learned judge disbelieved the first defendant finding the transfer and issuance of the strata title to the first defendant 'very suspicious and something is amiss in the whole transaction of the transfer of the strata title to D1 — see paras 4.9–4.10 of D6's written submission'. The learned judge did not find the first defendant to be a credible witness, that there were inconsistencies in his evidence as well as those of another witness, Jaya Jothi (DW2). There is no appeal by the first defendant.

[14] The claim against the sixth defendant was also dismissed; because there were no particulars of negligence alleged against the sixth defendant, and because no cogent evidence to support the allegation of negligence had been adduced. The sixth defendant had also counterclaimed for defamation. This was dismissed; there is no appeal by the sixth defendant.

OUR DECISION

[15] Having examined the records of appeal, the reasons for Her Ladyship's decision and the submissions made, we find merit in the plaintiffs' appeal.

[16] In essence, we disagree with Her Ladyship's conclusions that the SPA is a conditional agreement and that it is void for uncertainty. We must point out at the outset that the existence and authenticity of the three agreements relied on by the appellants are not in issue. The actions taken by the various parties thus far in any case, affirm the existence of these agreements; especially the action by the fifth defendant in suing the fourth defendant to assert his rights under the third agreement. Further, the arguments raised in relation to the assignment or lack of such assignment are also irrelevant since title to the property has already been issued.

[17] First, the matter of certainty of subject matter, whether the property which formed the subject matter of the SPA is the same subject property under the principal agreement, the second and third agreements but more importantly, whether it is the same property to which strata title has been issued to the first defendant. In our view, the answer is clearly in the affirmative.

[18] The property under the SPA is readily traced to and through the several agreements starting with the principal agreement made between the first defendant and the second defendant. The subject property of that principal agreement is clearly acknowledged in the SPA. Save for the differences in the size of the property in question and the details of the title in the master title, the other details identifying the subject matter or property in question are clear and the parties are not confused to the point where there is no *consensus ad idem* such as to invalidate the SPA. The differences are minor and can be and were easily explained away by the appellants and the witnesses called.

[19] The property under the SPA dated 5 August 2008 is described as parcel DG-4 in a building in Block D in Taman Fadason and it forms part of lands held under Master Title No HS (D) 99535, PT No 16914 (formerly Lots 9016 and 9017) in the Mukim of Batu, District of Kuala Lumpur, measuring 840 sqft (see p 124 CBD). This same description may be found in both the second agreement dated 13 June 2005 (p 54 CBD) and the third agreement dated 4 July 2006 (see p 64 of CBD), where the property is described in Schedule A as a shop-lot in Taman Fadason at Parcel No 4, Floor No G and Building No Block D. Both agreements also state that the property is land held under Master Title No HS (D) 99535, PT No 16914 (formerly Lots 9016 and 9017) in the Mukim of Batu, District of Kuala Lumpur.

[20] On the other hand, the property in the principal agreement is described in the First Schedule as a 'shop lot' located in parcel No 4, Building No Block D, Floor No G, where the 'saleable area (parcel including accessories parcel) measured approximately 1,188 sqft. The property under the principal agreement is part of lands held under Master Title No HS (D) 98840, PT No 16279 (formerly Lots 9016 and 9017).

[21] The learned judge found that it could not be reasonably inferred that all the above referred to the same subject property. In the deed of assignment of tenancy, the property referred to as the 'demised premises' was described as 'All that shop lot of the said property'. All this constituted discrepancies compounded by the fact that there is a difference in the size of the property — under the SPA, it is 840 sqft whereas under the principal agreement, it is 1.188 sqft were reasons why it could not be reasonably inferred that the plaintiffs' SPA with the fifth defendant concerned the same property referred to as 'D-G-5' and/or 'D-0-5'.

[22] With respect, we disagree.

[23] The discrepancy, if at all there is one, appears to be in the description of the Master Title. Under the principal agreement, it is known as Master Title No *HS (D) 98840, PT No 16279* (formerly Lots 9016 and 9017) whereas under the SPA, it is Master Title No *HS (D) 99535, PT No 16914* (formerly Lots 9016 and 9017). Save for this discrepancy, the property is always otherwise described and recognised as a 'shop lot', be it under the principal agreement or the SPA; or even the second and third agreements. This shop lot was always described as located in Parcel No 4, Block D and Floor G in the development known as Taman Fadason. What appears to be overlooked is that in either case, the former lot numbers of the land in question is the same, that is, Lots 9016 and 9017.

[24] It is our view that the plaintiffs had adduced more than sufficient evidence on the positive identification of the property. SP2, the advocate and solicitor who attended to the second and third agreements as well as the assignment and novation agreements, testified that the subject property was the same at all times in all these agreements; how a clerk in his office by the name of Cik Mazni had made mistakes as she had used a template in the preparation of the agreements, as seen in the other similar transactions which SP2's firm had done for other clients. This is strong cogent and material evidence which the learned judge was not entitled to disregard.

[25] SP3 from the Kuala Lumpur Land Office had also testified and adequately explained away the discrepancy and offered confirmation that the property was one and the same. His evidence was however, erroneously not

appreciated by the learned judge. There is no other property in issue; there are none suggested by the first respondent. A

[26] As mentioned earlier, we are inclined to view the discrepancies and mistakes as misdescriptions which do not vitiate the SPA. Such an issue in any case is one more properly taken up by the contracting parties and not by the first defendant. B

[27] As for the issue of non-fulfilment of the condition precedent, once again, this is an issue more properly canvassed by contracting parties. The fifth defendant has not contested the issue. In any event, cl 2.1 confers a benefit to the appellants which they may choose to waive which we find they have in fact waived by the full payment of the purchase price. See Federal Court's decision in *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392. C D

[28] We agree with the submissions of counsel for the plaintiffs that the third defendant was not entitled to transfer the registration of the strata title in favour of the first defendant as the first defendant had already divested his interest in the property by virtue of the second agreement, the existence and validity of which cannot be disputed. The third defendant held the property in trust for the plaintiffs as bare trustee as the plaintiffs had fully paid up the purchase price. Both the second and third defendants had notice of the fifth defendants' interest as assignee of the rights over the property. In law, these defendants as trustees, are therefore obliged to, at least to apply to court under O 80 of the Rules of Court 2012 for a determination of the issue of the rights rather than to act unilaterally and transfer the strata title to the first defendant. E F

[29] Since the first defendant had already sold his interest to the fourth defendant under the second agreement, the first defendant now holds the property registered in his name as bare trustee for the plaintiffs. G

[30] As for the claim against the sixth defendant, we find that the sixth defendant owes a duty of care towards the plaintiffs in respect of the matters complained of. The learned judge had found the pleadings against the sixth defendant wanting, that there was failure to particularise the allegations. This is para 19 of the re-amended statement of claim: H

> 19. The plaintiffs will further contend in the alternative that if the plaintiffs' rights as owners of the said property pursuant to the SPA have been in any way diminished or lost or in any way adversely affected, this would come about as a result of the negligence of the sixth defendant in failing as solicitors to take all steps to perfect the plaintiffs' rights over the said property pursuant to the SPA including keeping the plaintiffs duly informed of all development pertaining to the said property and/or in relation to the SPA, ensuring that all steps have been taken to ensure that the I

relevant strata title for the said property upon issuance would be registered or registrable in the name of the plaintiffs and/or otherwise advising the plaintiffs of their rights in relation to the said property and/or how such rights may be protected.

[31] In our judgment, the above is adequate in terms of pleading a case of negligence and the wherewithal of the allegations.

[32] However, whether such obligations in the respects exist in law and fact is entirely a different consideration. In this regard, we are of the concerted view that there was no case established against the sixth defendant and the claim was correctly dismissed and the appeal is therefore dismissed. In any event, given the pleaded claim, and in view of our decision, this alternative cause of action and remedy does not arise.

[33] In conclusion, we agree with the submissions of the plaintiffs that the learned judge had failed to have regard to the totality of evidence and had not properly appreciated the evidence. The overwhelming evidence is that the plaintiffs' claim was indeed proved on a balance of probabilities and ought to have been allowed.

[34] The appeal is therefore allowed in the terms as appearing at para 20 at p 81 of the record of appeal as follows:

(a) a declaration that the plaintiffs are the beneficial owners of the said property currently held under title PN(WP) 32992/M1/1/5, Lot No 57297, Mukim Batu, Negeri Wilayah Persekutuan, Kuala Lumpur;

(b) a declaration that the first defendant is trustee for the plaintiffs of the property currently held under title PN(WP) 32992/M1/1/5, Lot No 57297, Mukim Batu, Negeri Wilayah Persekutuan, Kuala Lumpur and is bound to account to the plaintiffs any legal estate or interest therein outstanding in relation to the property;

(c) an order directing the defendants to within seven days from the service of the order made herein to take all steps to vest the said property in the name of the plaintiffs as legal proprietor and beneficial owners thereof; and

(d) liberty to apply.

[35] We further order costs to be paid by the first respondent to the appellants while we make no order as to costs against the other respondents.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali